

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

Headquarters

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State Labor Commissioner

July 6, 1993

James N. Adler, Esq.
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Dear Mr. Adler:

Thank you for your letter dated June 14, 1993 requesting an administrative opinion concerning the executive exemption under Section 1 of the various Industrial Welfare Commission (IWC) Wage Orders.

Since, in part, your letter deals with the applicability of federal caselaw interpreting the Fair Labor Standards Act's (FLSA) administrative, managerial and professional exemptions to the IWC Wage Orders, we think it would be helpful to first outline how federal law differs from state law, and how those differences impact the Division of Labor Standards Enforcement's (DLSE) policies.

DIFFERENCES BETWEEN FEDERAL AND STATE LAW

The federal FLSA provides that the minimum wage and overtime provisions of the Act do not apply with respect to:

"Any employee employed in a bona fide executive, administrative or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of an outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor], subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service

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establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)...."

Section 1 of the California IWC Wage Orders provides the following exemption for administrative, executive and professional employees:

"(A) Provisions of Section 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. No person shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:

(1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than \$900 ¹ per month....."

As you can see, the language of the FLSA differs substantially from that of the IWC Wage Orders. The FLSA simply requires that the employee be "employed in the capacity" of an executive, while the IWC Wage Orders require that (in addition to the remuneration test) the person be "engaged in work which is primarily ² intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment." However, probably the most important feature of the FLSA which sets it apart from the IWC Wage Orders is the fact that Congress allowed the Secretary of Labor to "define and delimit" the terms "executive, administrative and professional." In California, on the other hand, the IWC, and not the

¹ Some of the Wage Orders require a remuneration level of \$1150 per month.

² Section 2 of the Wage Orders defines the word "primarily" to mean "more than one-half." While the word "primarily" is also used in the federal regulations, it is not defined. For the purposes of the federal regulations, the federal courts have interpreted "primary" according to its dictionary definition as "principal" or "chief" and have declined to establish a time criterion such as "more than one-half."

Division, has the responsibility for defining these key terms in the Wage Orders.

In response to the directive of Congress, the Department of Labor has promulgated regulations which "define and delimit" the terms executive, administrative and professional. For instance, the federal regulations begin by describing an individual "employed in a bona fide executive.....capacity" as one:

"(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of (sic.) subdivision thereof;..."

The federal regulations contain both a "long test" and a "short test" for determining the exempt status of workers. The "long test" has a threshold salary requirement (\$155.00 per week) and has three additional requirements: (1) the employee must have authority to hire or fire (or his or her recommendation in this regard must be given weight); (2) the employee must customarily and regularly exercise discretionary powers; and (3) the employee must not devote more than 40 per cent of his or her time to activities not "closely related" to management duties. The "short test" looks initially to an enhanced salary requirement (at least \$250.00 per week) and then requires only that (1) the "primary duty" of the employee be managerial; and (2) the employee must regularly direct the work of at least two other employees. Under this "short test," the allocation of the employee's time is not in issue.

The use of the differing criteria in the "long test" and "short test" depending on the amount of the salary paid was a decision made by the DOL based upon enforcement costs. On the other hand, the IWC has no salary test (only a "remuneration" test) in the Wage Orders, and the DLSE has not been given the discretion to set a salary test as has the Department of Labor. Therefore, it is not feasible to utilize the federal regulations to determine whether one is exempt under the IWC Wage Orders. However, even if we were not faced with the problem of the salary test to determine the appropriate criteria to be used, the primary consideration under either the federal "long test" or "short test" is the "primary duty" of the worker; under the IWC Wage Orders, the emphasis is upon the type of work the employee is "engaged in."

The "primary duty" test as defined by the federal courts is best summed up by the language in *Donovan v. Burger King*, 675 F2d 516 (2nd

Cir. 1983) which held that "an employee can manage while performing other work, and [that] this other work does not negate the conclusion that his primary duty is management." That same court stated that "one can still be 'managing' if one is in charge, even while physically doing something else."

Unlike the federal regulations which look to the "primary duty" of the employee, the IWC Wage Orders emphasize the type of work the employee is "primarily engaged in." In addition, the IWC adopted a definition of the word "primarily" to mean "more than one-half the employee's work time." While the IWC did not define the term "engaged in," the dictionary definition is: "[T]o involve oneself or become occupied" (American Heritage Dictionary, New College ed., p. 433). Thus, the term "primary duty" used by the federal government in the enforcement of the Fair Labor Standards Act has little relationship to the term "engaged in work which is primarily" used by the DLSE in enforcing the IWC Wage Orders.

As the federal courts have pointed out, an employee whose "primary duty" is management may manage "even while physically doing something else" and such an arrangement would not be inconsistent with the federal regulations. The IWC Wage Orders, on the other hand, require the Division to ascertain the type of work the individual is actually doing or "engaged in" (e.g., "managerial" or "production or sales") and count the time on either side of the exempt/nonexempt ledger. The DLSE policy is to give credit for all time spent in managerial work: but not to credit time toward managerial time when the actual work the employee is "engaged in" at the moment is production or sales work.

DIVISION ENFORCEMENT POLICY

The Division takes the position that any time related to management which may be logically separated from production or sales time must be counted towards the managerial duties of the employee. Managerial duties must include the supervision of at least two other employees with either the concomitant right to hire and fire or the right to recommend hiring and firing where such recommendation is given serious consideration. The "management" employee must regularly exercise discretion and, unlike the federal regulations, must also exercise independent judgment.³

³ The federal regulations require the exercise of "independent judgment" in order to qualify for exemption as an administrative employee, but, unlike the IWC Wage Orders,

Discretion implies that one has a choice to make but does not mean that exempt employees must enjoy the right to deviate from an employer's policies or procedures which allow for some discretion. However, if those policies and procedures so tightly restrict the manager's ability to make an independent judgment on matters of any consequence, the manager will not be exempt.

Management duties may vary in specifics depending on the industry or the job classification, but must include the above cited minimums. Some examples of management duties which DLSE will accept include:

Interviewing and selecting employees; training employees; setting of rates of pay and hours of work; directing the work of employees; maintaining production or sales records; appraising work performance; recommending changes in status; handling complaints; disciplining employees; planning work schedules; determining techniques to be used; apportioning work among workers; determining the type of materials, supplies, machinery or tools to be used; controlling the flow and distribution of materials, merchandise or supplies; controlling revenue and expense; and providing for the safety of employees and property.

The above list is not inclusive or exclusive. It must also be noted that one may be employed to perform some of the above, while not employed as a manager or supervisor. For instance, some of the duties described above may be done by employees with no supervisory authority. While those employees may (or may not) meet the criteria for exemption as administrative employees, they would not be exempt under the executive classification.

Any time taken away from production or sales work and devoted to any managerial work (no matter how short the time span may be) is considered managerial work and must be counted as exempt work. However, the employee may not be "engaged in" two jobs at once. The question asked in your letter is basically how does one determine what

there is no requirement that the employee exercise "independent judgment" to qualify for the executive (managerial) exemption.

activity an employee is "engaged in" when two activities are performed simultaneously.

One of the examples you give in your letter involves an employee whose work includes composing letters, etc., but the employee uses a word processor to accomplish it. You state "although the mechanical work of operating the word processor would be considered to be non-exempt work if performed by a secretary or a employee whose duties were limited to word processing, all of the time spent operating a word processor by an otherwise exempt employee should be considered to be exempt time if the exempt employee is composing or editing a document sufficiently related to his exempt duties."

In this particular example, the employee would be "engaged in" the work of composing or editing the document. The activity of word processing would be incidental to the primary activity that the employee is engaged in at the time.

The second example that you give involves a manager who may be waiting for customers, but for a substantial portion of the time is not actually making or attempting to make sales or performing service activities. You state that "during that time it is also his job to consider such matters as how he can cause his establishment to perform more efficiently and more profitably; how he can motivate or otherwise assist his complement of four or more service employees to perform their functions more effectively; how he can resolve any employee or other problems which have arisen; whether each of these employees is doing his or her job in an adequate manner; how corrective action can be taken with regard to any such employee who is not adequately performing; and whether his inventory is proper."

Once again this employee is "engaged in" work that is exempt. The fact that he also may be waiting for customers is incidental to the work that he is "engaged in." During the times between customers, the manager uses his or her discretion and independent judgment to decide what other exempt work must be done. Of course, if the employer required employees to do specific nonexempt work (such as stock work, dusting counters, etc.) during the times between customers, the nonexempt work would be considered just that... nonexempt work, and would be counted as such.

A more striking example would be if the manager sent his sales staff to lunch because he knew it would be a slow time, preferring to have the sales staff at the store during the peak sales period. During the time that the

sales staff is out to lunch, the manager is the only employee who can wait on customers when they come into the store. Assuming that the manager satisfies all of the other exemption requirements, it would not be assumed that this time between customers would be considered nonexempt. The manager used independent judgment to determine the best use of staff time and would be engaged in other exempt activities during the time there are no customers to be waited on. While the actual time spent selling may be considered nonexempt, the assumption should not be that all other time between customers is also automatically nonexempt.

The determination of what activity an employee is "engaged in" is dependent on the facts of the individual situation. One activity can be nonexempt under one set of facts and exempt under another. For example, a manager's immediate supervisor is flying into town. The manager makes the decision to drive to the airport and pick up his supervisor so that they can talk privately on the way back to the office. If the manager had sent a clerk to pick up the supervisor, the clerk would be "engaged in" the nonexempt activity of driving to the airport and picking up the supervisor. On the other hand, the manager decided the best use of his time was to drive to the airport so that he could spend time with his supervisor discussing the business. The presumption would have to be that the manager was "engaged in" exempt activities related to the planning and evaluation of his business. The fact that he was driving to and from the airport was incidental.

In terms of enforcement, the Division takes the position that if an employee fulfills all of the other requirements of the managerial or executive exemption, the presumption is that the activity the employee is "engaged in" is probably exempt, unless the facts prove to the contrary. This presumption is logical if one considers that an employer is not going to allow an employee to supervise two or more workers and exercise discretion and independent judgment on matters of consequence, and then allow that employee to do primarily nonexempt work. This would not only be illogical, it would also be unrealistic.

Since the determination as to whether an employee is exempt or nonexempt is done on a case-by-case basis depending on the specific facts involved in each situation, the Division does not give blanket approvals or opinions concerning the exemption status of a group of employees. We will, however, provide the criteria for evaluating the exemption status so that employers can realistically assess whether an employee is exempt or nonexempt. I hope that this letter clarifies the Division's policy concerning the determination of what activity an employee is "primarily engaged in"

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when evaluating the exempt status of that employee under the managerial or executive exemption provided in the IWC Wage Orders.

Very Truly Yours,



Victoria L. Bradshaw
State Labor Commissioner

cc: Regional Managers
✓ Senior Deputy Labor Commissioners
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1993.07.06

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June 14, 1993

VIA FEDERAL EXPRESS

Ms. Victoria L. Bradshaw
State Labor Commissioner
State of California
455 Golden Gate Avenue
San Francisco, CA 94102

Re: Managerial Exemption

Dear Ms. Bradshaw:

I.

Introduction

We are writing on behalf of a client to request an opinion with regard to a particular aspect of the executive exemption under Section 1 of the various Industrial Welfare Commissioner orders. More particularly, our question concerns the manner in which this exemption is to be applied to the managerial employees of certain retail service establishments. Typically such establishments are managed by a manager and an assistant manager and employ four to ten service employees whose work is supervised by the manager and assistant manager.

The work of the service employees is largely manual and, except when a manager or assistant manager lends a hand, is totally different in nature from the work of the manager and assistant manager. Because establishments of the type at issue are generally open more than eight hours a day, seven days a week, there are a number of whole or partial days each week when the assistant manager is in sole charge of the operations of the establishment. In addition to managing the establishment and supervising its service employees, such

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managerial and assistant managers are responsible for the sale of the establishment's goods and services.

The particular question which is the focus of this letter concerns how "primarily", as used in Section 1 of the Industrial Welfare Commission Order, is to be applied in accounting for the activities of managers and assistant managers of retail service establishments of the type discussed in this letter. The starting point for our analysis has been Section 10.61 of the Division's Guidelines, which provides in pertinent part:

An executive is one who is in charge of a unit with permanent status and function and who ordinarily supervises the activities of others. In order for an employee to be exempt as a bona fide executive, all the following tests must be met:

- (a) The primary duty must be management of the enterprise, or of a customarily recognized department or subdivision;
- (b) In most cases, the employee must customarily and regularly direct the work of at least two or more other employees therein;
- (c) The employee must have the authority to hire and fire, or to command particularly serious attention to his or her recommendations on such actions affecting employees;
- (d) The employee must customarily and regularly exercise discretionary power;
- (e) The employee must devote less than 50 percent of work time to activities not directly and closely related to managerial duties. This test must be met even if the employee is in "sole charge" of an establishment.

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II. Facts

Our particular question arises in the context of managers and assistant managers who are responsible for the management and profitability of their stores and who in carrying out these responsibilities, direct the work of two or more other employees; interview potential new employees and make meaningful recommendations with regard thereto; evaluate the performance of current employees; entertain and resolve employee complaints; suspend, terminate or discipline employees or make meaningful recommendations in this regard; plan, determine and distribute work; conduct safety meetings and train employees with respect to safety and other issues; send employees home early as a management tool to control payroll costs where the manager or assistant manager projects insufficient need for their services; authorize overtime work; ensure that the appearance of their store is maintained; ensure that their store's machinery operates in a safe manner; and ensure that their store maintains adequate product inventory, materials, and tools. In addition, the manager and assistant manager are responsible for making sales of their stores goods and services and for ensuring that the company's customers are satisfied. Some managers and assistant managers also spend some of their time performing service functions of the type performed by the stores' service employees. For purposes of this letter we will assume that all managers and assistant managers work an eleven hour day, of which a cumulative total of four hours are spent making or attempting to make sales of the establishment's products and services or performing service and other functions.¹ All managers and

¹In fact these amounts will vary somewhat. The work day will generally range from nine to eleven hours in length and the time spent making or attempting to make sales will generally vary from one to three hours per day with the time spent performing service and ministerial functions varying inversely from three hours to one. We believe, however, that the numbers we have presented in the text fairly present the legal issue addressed in this letter.

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assistant managers² are paid substantially more than \$1,150 per month.

III.

Discussion and Refinement of Specific Issue

With the exception of making sales and performing service functions, the duties set forth above have all been recognized by the Division as managerial and there are many decisions, including many reported federal decisions, which recognize that managers and assistant managers who perform these duties are performing exempt work essential to the successful operation of their establishments.

In California, however, a particular issue arises by virtue of the definition of "primary" and the statement in Section 10.61 that "making sales" is an example of a non-exempt duty. Although it is our belief that in many instances making sales and performing some service and other functions require sufficient discretion and independent judgment and are sufficiently related to managerial work so as properly to be classified as exempt, for purposes of this letter we are not challenging the fact that time actually spent in these activities will normally be classified by your Deputy Labor Commissioners as non-exempt.

Because it is the responsibility of the managers and assistant managers to be concerned with the operation and profitability of their store at all times and to be sure at all times that the other employees are properly performing their work, we believe that all of their hours should be recognized as hours spent performing exempt work for purposes of applying the fifty percent/"primarily" test even if some of this same time is also spent performing work which would otherwise be considered to be non-exempt. After all, it is readily apparent, as has been recognized under the Fair Labor Standards Act, that except and non-exempt work can be carried

²The assistant manager is generally in charge of the store for two or more days out of every week as well as being responsible for the store during periods of time when the manager is on vacation or ill. In addition, the assistant manager works with the manager as part of a management team; it is the responsibility of both to ensure that all management functions, including employee supervision and customer satisfaction, are consistently performed.

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out simultaneously. See, for example, Donovan v. Burger King, 675 F.2d 516, 521 (2d Cir. 1982) ("much of the oversight of the operation can be carried out simultaneously with the performance of non-exempt work"); Paddy v. Smith, 20 W.H. Case: 1176, 1177 (W.D. La. 1973) ("Even during the time in which he was engaged in some menial capacity, his supervisory responsibility for the store and its employees continued").

A good example of why this is so is provided by an employee whose work includes composing on a word processor. Although the mechanical work of operating the word processor would be considered to be non-exempt work if performed by a secretary or an employee whose duties were limited to word processing, all of the time spent operating a word processor by an otherwise exempt employee should be considered to be exempt time if the exempt employee is composing or editing a document sufficiently related to his exempt duties.

This same result should apply to our hypothetical situation. Even when a manager or assistant manager is engaged in sales or service activities, he remains responsible for the operation and management of his store. Moreover, as he performs such activities he can simultaneously perform such clearly managerial work as observing and evaluating his employees and the operation of his store.

Even if your Division should not recognize that a managerial employee may be observing and evaluating how employees are performing their duties or may be thinking of how to better operate his store and thus be performing exempt work while he is making or attempting to make sales or performing service activities, it would still be necessary, under the hypothetical we are discussing, to find that the managers and assistant managers in question are exempt employees because they are engaged in work which your division has considered to be non-exempt for only four of their eleven hours. This result should follow, moreover, even if such a manager or assistant manager is waiting for customers during a substantial portion of the time he is not actually making or attempting to make sales or performing service activities, for during that time it is also his job to consider such matters as how he can cause his establishment to perform more efficiently and more profitably; how he can motivate or otherwise assist his complement of four or more service employees to perform their functions more effectively; how he can resolve any employee or other problems which have arisen; whether each of these employees is doing his or her job in an

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adequate manner; how corrective action can be taken with regard to any such employee who is not adequately performing; and whether his inventory is proper. Each of these responsibilities, of course, involves performing exempt work.

In sum, under the circumstances, it is our opinion that all time on the job (and a great deal of time off the job as well) spent by the managers and assistant managers described in this letter, including time when the managers or assistant managers may also be waiting for customers, must be found to exempt time for purposes of applying the fifty percent/"primarily" test. Moreover, even if time actually spent in sales or service activities is considered as being time spent only in non-exempt activities, the managers and assistant managers in our hypothetical would nevertheless be properly classified and paid as exempt executives employees, for in the specific hypothetical discussed in our letter, no less than seven hours each day would be considered to be time spent in exempt activities and no more than four hours each day could be considered as non-exempt time.

It is our opinions in this regard which we are asking you to confirm. We believe our analysis and conclusions are not only consistent with the Industrial Welfare Commissioner Orders and with reality, but also important to our State and its communities, for it is essential for the effective operation of many small retail service establishments that their managers and assistant managers function, and think of themselves, as exempt members of management.

If we can be of further assistance to you by providing additional information or analysis, please let us know. We are most anxious to have the Division recognize the exempt status of managers and assistant managers of the type discussed here.

Sincerely,

JNA:dsb



James N. Adler